IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE SIDE

CRIMINAL APPLICATION NO.4233 OF 2006

Deepak Gopaldas Bajaj .. Applicant.

V/s.

The State of Maharashtra & Ors. .. Respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 18TH DECEMBER, 2006

P.C.:

1. Heard Shri.Kantawala appearing for the applicant. Shri.Desai, Additional Solicitor General of India appearing for respondent Nos.1 & 2 and the learned A.P.P. appearing for Respondent No.3.

2. The applicant apprehends arrest in connection with an offence registered against the persons, whose names are enlisted in the remand application at page 22. Shri.Kantawala submits that the applicant apprehends arrest because, about nine consignments which have been allegedly diverted, are got cleared and imported by the

applicant in the name of M/s.Suvidh Overseas. He submits that the prosecution case as set out in the remand application would reveal that the advance licenses under D.E.E.C scheme have been obtained by one M/s. Suvidh Overseas, Mumbai. The goods in question were fabrics of various grades. These goods were originally imported in the name of various firms holding Import Export Code license (for short "IEC") issued in their names. The IEC code holders have allowed their names to be used for monetary considerations. The goods were brought in for the benefit of one Shri.Girish Shah. The IEC code holders have misled the Director General of Foreign Trade (for short "DGFT) and indulged in the activity of importing these goods under the scheme and take the benefit thereof. It is in such circumstances, according to Shri.Kantawala that the duty free import was allowed. The goods have been procured by one Kuresh Rajkotwala from Girish Shah. He submits that the remand application, a copy of which is annexed at page 22 & 23 makes the above allegations.

3. However, Kuresh Rajkotwala was arrested in connection with these offences and as he is concerned, the case proceeded on the basis that the applicant is guilty of the offences punishable u/s.135(1) (ii), in other

words, the said Kuresh Rajkotwala was charged with commission of bailable offence whereas in the case of the present applicant alone Sec.135(1)(ii) has been invoked. He submits that for that provision to be invoked, Sec.123 must come into play. Sec.123 is a Section, which according to Shri.Kantawala would put the burden of proof in case of smuggled goods, when they are seized from possession of any person, on the person from whom the goods were seized while not disputing that the notification issued by the Central Govt. u/s.123 sub-section (2) applies to the goods in question. Shri.Kantawala contends that the seizure is not from the possession of the present applicant. It is from a godown at Bhiwandi. This godown is not in possession of the applicant. It is not belonging to the applicant either. It is in the name of his wife. Even his wife was not in physical possession of this godown on the relevant date. He submits that the godown has been given to one Ramchandra on tenancy basis. The said Ramchandra is in possession of this godown. A suit has been filed in civil court by Ramchandra, which is pending. In his submission therefore once Sec.123 is not applied to Rajkotwala, there is no warrant in making the same applicable to the goods and the case of the applicant specifically. That apart,

it can be so invoked and applied, yet, the pre requisites thereunder having not been satisfied, it is clear that the applicant is guilty of a non-bailable offence. Consequently, there is no question of his plea for anticipatory bail being rejected as he does not apprehend any arrest. While heavily relying upon the decision of learned Single Judge of this Court followed in the case of Kuresh Taherbhai Rajkotwala v/s. Union of India and Ors., Mr. Kantawala also invites my attention to the Manual and states that the provisions therein have to be complied with before any seizure has to be done. He also relies upon the decisions of the Hon'ble Supreme Court in the case of Gian Chand And Others v/s. State of Punjab (Criminal Appeal No.194 of 1960, decided on 13-11-1961) reported in 1983 (13) E.L.T. 1365 (S.C.).

4. He has also referred to a decision of the Settlement Commission, Customs And Central Excise, Mumbai in the case of Idris Y.Porbunderwala .

5. The learned Additional Solicitor General of India, on the other hand submits that the applicant in this case is guilty of a non-bailable offence. He submits that the burden of proof, which is contemplated in Sec.123 is in

relation to the goods, to which the Section applies. He submits that there is no dispute that by virtue of the notification issued by the Central Govt. on 20th July, 1984 and amended till date, Sec.123 has been applied to the goods in question, namely, Fabrics. He submits that when there is a seizure under the Act in the reasonable belief that the goods are smuggled goods, then the question of burden of proving that they are not so will arise at a later stage. It is at that stage that the applicant can show that the seizure is not from his possession. All materials in that behalf are available to be placed and this is not a stage where the said burden can be discharged. That apart, preliminary investigations have revealed large scale diversion of goods meant for import in India for the purpose of manufacturing goods which are to be ultimately exported. It is therefore as an incentive that the scheme promote duty free import. Once, this scheme has been misused and the goods worth crores of rupees have been brought in and diverted in local markets, then clearly an offence is committed under the above mentioned provisions.

6. With the assistance of the learned counsel appearing for both sides, I have perused the application

and the annexures thereto, affidavit-in-reply, rejoinder and relevant statutory provisions. I have also perused the decisions brought to my notice. There is no dispute between the parties that if the offence in question is u/s.135 (1)(ii), then it is clearly non-bailable and the application therefore will have to be tested, scrutinized and decided on the touch tone of Sec.438 of Cr.P.C. If the offence alleged is punishable u/s.135 (1)(i), then, it is a bailable offence and in that event this application would not be maintainable.

7. From a perusal of the earlier application and the pleas raised in the affidavit-in-reply, it is apparent to me that the notification u/s. 123 (2) is issued and applies to the goods which are seized. From the materials produced at this stage, prima facie, it is revealed that the goods, which are meant to be utilised as raw materials in manufacturing goods meant for ultimate export, have been diverted contrary to the policies and the provisions under the Section to local market. The statements of the concerned persons have been recorded. The diversion is of 29 consignments and the applicant is charged with dealing in 9 of them. Once such is the case, then the seizure is in the reasonable belief that the goods are smuggled.

Therefore, Sec.123 (1) would apply. The burden of proving that they are smuggled goods is open. The applicant relies on the fact that the seizure is made from a godown which is not in his possession. In my view, that version of the applicant cannot be accepted straightaway at this stage. If the same is to be accepted, appropriate pleas have to be raised and the burden discharged in accordance with law. Merely because in the affidavit, a statement is made by the applicant that the godown is not in his possession does not mean that the burden is discharged.

8. The prosecution, on the other hand has shown me the documents which are forming part of the compilation of the investigation papers. The statements of Shri.Kuresh Rajkotwala and one Shri.K.S.Murugan disclose that the applicant is the owner of the godown premises. The particulars are set out. Therefore, this is not a stage to go into and pronounce as to whether the burden has been discharged or not. It would be open for the applicant to raise all pleas and substantiate them by producing relevant material.

9. From the affidavit, it is pointed out by the prosecution that the investigations are at preliminary

stage. The modus-operandi is that the IEC holders imported certain goods meant for Tuticorin Port and sold them on high seas sale basis to M/s.Suvidh Overseas. The IECs have been got issued from D.G.F.T. as per the instructions of one Girish Shah. It is alleged that Girish Shah acted as a conduit for transactions in the said IEC for import purpose with Kuresh Rajkotwala for monetary consideration basis. Kuresh Rajkotwala then came in contact with the applicant. It is alleged that there are further persons involved including one Sunil Chavan. In the Affidavit in para. 3 (b) to (d) & in para.4 it is pointed out that the investigations show that the applicant has imported and got cleared, more than 9-10 consignments involving duty to the tune of Rs.6.86 crores, in the name of M/s.Suvidh Overseas. The illegal import transactions are spread over to Mumbai, Delhi, Tuticorin and other places. Number of other persons are required to be apprehended so also their bank accounts seized and other documents taken in custody.

10. In my view, considering the fact that the investigations are at preliminary stage and a case is made out for custodial interrogation, it is not possible to agree with the submission of Shri.Kantawala that since the

applicant has attended the office of Investigating Machinery as directed by this court, this application must be allowed. In my view, the ingredients of Sec.438 of Cr.P.C. have to be satisfied. In the instance case, the custodial interrogation becomes necessary as pointed out in details. In such circumstances, I am not inclined to enlarge the applicant on pre-arrest bail.

11. For the above reasons, the application is dismissed.

12. At this stage, Mr.Kantawala requests that the ad-interim relief granted on 28th November, 2006 be continued so as to enable the applicant to approach the higher court. Shri.Desai opposes this request.

13. Considering the nature of the allegations and the requirement of custodial interrogation of the applicant, I am not inclined to continue the ad-interim relief any further and it stands vacated forthwith.

(S.C.Dharmadhikari, J.)